before the date of distribution, to live in the said house.

The English cases that I have set out above, except *May* v. *May*, [6] are not analogous to the present case.

The words used here are "to reside therein." It is clear that the testator's sole intention was that the defendant, his wife and his children should reside in the house rent free until the date of distribution. This is in my opinion a gift of a right personally to reside in the said house and it does not carry with it the right to make any profit.

In my view the defendant has only a licence personally to reside in the said house rent free until the date of distribution and he is not at liberty to let the said house or any part of it.

Order accordingly.

Solicitors: *Wee Swee Teow & Co.; Mallal & Namazie; Pillai & Co.*

Re BUKIT SEMBAWANG RUBBER CO. LTD. & SEMBAWANG ESTATES LTD.

[O.C.J. (Chua J.) July 5, 1961]

[Singapore — Originating Motion No. 12 of 1961]

Mandamus — Crown servant — When lies — No specific legal remedy — Delay amounting to repeal.

Land acquisition — Award by Collector — Delay — Application for mandamus — Land Acquisition Ordinance (Cap. 248), ss.10 and 53.

In this case the applicants sought for an order of mandamus directed to the Collector of Land Revenue compelling him to comply with the provisions of section 10 of the Land Acquisition Ordinance and to make an award in respect of the said land, alternatively compelling him in exercise of the powers contained in section 53(1) of the said Ordinance to withdraw from the acquisition of the said land and to determine and pay all such amounts by way of compensation and costs as may be due to the applicants under the provisions of section 53 of the said Ordinance. It was contended for the respondent that *mandamus* will not lie against the Collector because (1) he was a Crown servant, (2) the application was for the payment of money by the Crown and consequently *mandamus* would not lie against the Crown, (3) the applicants had not exhausted all the available remedies, (4) it was purposeless for the Collector to make an award as he would not be in the position to pay on the award because the Government had frozen the budget, (5) while there had been a demand the Collector had not refused to make an award, and (6) the writ might be made inoperative by certain actions which were beyond the control of the Collector.

Held: (1) the proposition that *mandamus* would not lie against a Crown servant is not true if he is acting under a statutory power which imposes upon him a duty to the public. The Collector is vested by statute with public duties affecting the rights of private persons and he is under section 10 of the Land Acquisition Ordinance in a *quasi*-judicial capacity to decide between the subject and the Crown;

(2) this application is not to enforce payment of money by the Crown but to enforce the making of an award by the Collector which it is the duty of the Collector to make;

(3) neither an application to the Minister nor an application by way of petition of right to the Yang di-Pertuan Negara is a specific legal remedy and they cannot therefore be a bar to this application;

(4) there is nothing to prevent the Collector from making the award. If the Collector has no funds then he need not take possession of the said land and he need only pay 8% interest on the award until it is paid. In any event the budget was frozen in 1958 and there is no evidence that there are at present no funds available;

(5) the Collector had been guilty of such delay as to amount to a refusal to make an award;

(6) although the Court will not issue a *mandamus* if it is futile, its issue will not be futile in this case.

Cases referred to:—

(1) *The Queen* v. *The Secretary of State for War* [1891] 2 Q.B. 326.

(2) *The Queen* v. *The Lords Commissioners of the Treasury*, L.R. 7 Q.B. 387.

(3) *The Queen* v. *The Commissioners for Special Purposes of the Income Tax* (1888) 21 Q.B.D. 313.

(4) *R.* v. *The Commissioners for Special Purposes of Income Tax* [1920] 1 K.B. 26.

(5) *Re The Bristol & North Somerset Railway Co.* (1877), 3 Q.B.D. 10.

(6) *R.* v. *The Brecknock and Abergavenny Canal Co.*, 111 E.R. 395.

(7) *R.* v. *Central Professional Committee for Opticians* [1949] 2 All E.R. 519.

APPLICATION FOR *MANDAMUS*.

G. S. Hill for the applicants.

T. S. Sinnathuray (Crown Counsel) for the respondent.

Cur. Adv. Vult.

Chua J.: The applicants in this case are the Bukit Sembawang Rubber Company Ltd., a rubber-growing company, and the Sembawang Estates Ltd., a land development company.

The Bukit Sembawang Rubber Company Ltd. were seized of the land and premises known as Lot 143-1 of Mukim XIII, created by a Statutory Land Grant, situate in the district of Sembawang (which I will refer to as the said land). By an agreement for sale dated the 29th March, 1955, made between the Bukit Sembawang Rubber Company Ltd. and the Sembawang Estates Ltd., the Bukit Sembawang Rubber Company Ltd. agreed to sell and the Sembawang Estates Ltd. agreed to purchase *inter alia* the said land. The applicants have surrendered to Government the Statutory Land Grant and it was a term of the arrangement between Government and the applicants that the applicants would authorise Government to issue a new Title in favour of the applicants or their nominees as the applicants may from time to time require.

On the 3rd October, 1957, in exercise of his powers under section 8 of the Land Acquisition Ordinance (which I will refer to as the Ordinance) the Collector of Land Revenue (whom I will refer to as the Collector) gave notice to the Bukit Sembawang Rubber Co. Ltd. that the Government intended to take possession of the said land for a public purpose in accordance with a declaration dated the 23rd July, 1957, and published in the Government *Gazette* of the 2nd August, 1957.

In exercise of his powers under section 10 of the Ordinance, the Collector, on the 7th and

8th November, 1957, proceeded to enquire into the objections stated by the applicants pursuant to the said notice given under section 8 and heard arguments on behalf of the applicants.

About three months later, on the 7th February, 1958, the Secretaries of the Sembawang Estates Ltd. (which I will refer to as the Company) enquired of the Acting Deputy Commissioner of Lands when the award was expected to be published. No reply was received and the Secretaries of the Company wrote a reminder on the 13th March, 1958. By letter dated the 23rd April, 1958, the Collector replied to the Secretaries of the Company asking for confirmation of the Company's claim in writing. On the 30th April, 1958, the Secretaries of the Company replied setting out the details requested and expressed the hope that the Collector might be able to make his award which was long overdue. There the correspondence ended and nothing further took place until February, 1961.

On the 7th February, 1961, the Secretaries of the Company wrote to the Commissioner of Lands in these terms:—

"The last letter we received from you dealing with the above matter was dated 23rd April, 1958 to which we replied on 30th April, 1958.

In view of the long period of silence which has ensued, we would be grateful if you would inform us whether Government has officially withdrawn from this acquisition and we have missed notification of that, or if not, whether it is your intention to do so.

If, we suppose, it is Government's intention to withdraw from this acquisition we will be grateful if you would do so without further delay.

We trust it will be appreciated that this land has been under notice of acquisition from the 2nd August, 1957."

The Commissioner of Lands replied on the 9th February, 1961, informing the Secretaries of the Company that the matter of "withdrawing or otherwise" from the said acquisition was under active consideration. Nothing further was heard from the Commissioner of Lands and on the 9th March, 1961, the Secretaries of the Company wrote to the Commissioner of Lands in these terms:—

"We thank you for your letter ref: (2) in L.O. (Q) 75/57 Pt.4 dated 9th February, 1961.

The Directors were surprised to learn that after 3½ years and despite several reminders, this acquisition is still described by you as being under active consideration.

A further month has elapsed since your letter and we are now instructed to inform you that unless some definite action in respect of this acquisition is taken by the 24th March, 1961 it is the intention of this Company to instruct its lawyers to take proceedings to obtain an order of *mandamus* to compel you to discharge your duties under the Land Acquisition Ordinance."

No reply was received from the Commissioner of Lands and on the 5th April, 1961, the Company's solicitors wrote to the Commissioner of Lands the following letter:—

"We act for Messrs. Sembawang Estates Ltd. who have referred to us their letter to you dated the 9th March, 1961, a copy of which is enclosed with this letter. Our clients instruct us that they have received no reply to their letter of the 9th March and we are further instructed to inform you that unless appropriate action is taken by you within seven days of today's date, proceedings by way of *mandamus* will be commenced without further notice to you to compel you to discharge your duties under the Land Acquisition Ordinance."

Still no reply was received and on the 14th April, 1961, the Company's solicitors again wrote a letter, this time addressed to the Collector, in these terms:—

"On the 5th April we wrote by Registered A.R. letter to the Commissioner of Lands. We should in fact have written to the Collector of Land Revenue, and we therefore now address you. We act for Messrs. Sembawang Estates Ltd. who have referred to us their letter to the Commissioner of Lands dated the 9th March, 1961, a copy of which is enclosed with this letter. Our clients instruct us that they have received no reply to their letter of the 9th March and we are further instructed to inform you that unless appropriate action is taken by you within seven days of today's date, proceedings by way of *mandamus* will be commenced without further notice to you to compel you to discharge your duties under the Land Acquisition Ordinance."

No reply was received from the Collector and on the 25th April, 1961, the applicants applied for and on the 28th April, 1961, they obtained leave to apply for an order of *Mandamus* against the Collector.

On the 5th May, 1961, the applicants applied for an order of *Mandamus* directed to the Collector compelling him to comply with the provisions of section 10 of the Ordinance and make an award in respect of the said land, alternatively compelling him in exercise of the powers contained in section 53(1) of the Ordinance to withdraw from the acquisition of the said land and to determine and pay all such amounts by way of compensation and costs as may be due to the applicants under the provisions of section 53, on the grounds that "despite repeated requests from the applicants the Collector of Land Revenue has still not made any award nor has he withdrawn from the acquisition and by reason thereof the applicants are unreasonably prevented from dealing with the said land in accordance with the normal incidents of ownership."

A copy of the order of Court of the 28th April, 1961, together with a copy of the Notice of Motion dated the 5th May, 1961, were served on the Collector on the 6th May, 1961. The Collector handed these documents to the Crown Counsel in the State Advocate-General's chambers only on the 16th May, 1961.

On the same day, 16th May, 1961, the State Advocate-General wrote to the applicants' solicitors, *inter alia*, as follows:—

"I am to inform you that Government has now withdrawn under section 53 of the Land Acquisition Ordinance (Cap. 248) portions of the land which it had declared to be acquired under section 5 of the said Ordinance pursuant to *Gazette* Notification No. 1953 and published on 2nd August, 1957. I attach herewith a copy of the *Gazette* Notification which should appear in the next issue of the Government *Gazette* showing those portions which the Government has withdrawn from acquiring.

With regard to the remaining portions of the land which was declared to be acquired by the *Gazette* Notification No. 1953, I am to inform you that Government intends to proceed with the acquisition of it. I understand that proceedings are now being taken under the said Ordinance to complete the acquisition of such remaining land.

In view of the above I shall be pleased if you could take further instructions from your clients and inform me whether they intend to proceed further with the above Motion."

On the 18th May, 1961, the applicants solicitors wrote to the State Advocate-General as follows:—

"We thank you for your letter of the 16th May, the contents of which we are referring to our clients for their instructions. We note what you say in paragraph 3 and we take it that when you say that proceedings are now being taken to complete the acquisition, you mean that the Collector will be making an award. The enquiry, as you know, has already been held. Please let us know when the award will be made as this is a very material point in considering whether our clients wish to proceed further with the above Originating Motion."

On the 20th May, 1961, the State Advocate-General replied:—

"I am informed by the Collector of Land Revenue that an inquiry was held by the former Collector but that he did not proceed to make an award. The present Collector has some doubts as to whether the former Collector can now make an award or alternatively whether the present Collector may now make an award on the inquiry held by the former. It would appear that the Land Acquisition Ordinance does not contain any provisions with regard to the contingency that has arisen in the particular circumstances. It is because of this that the present Collector is desirous of holding a further inquiry.

I am of the view that since the Ordinance is silent on this point the present Collector may proceed to make an award on the inquiry held by the former Collector. I am, however, informed by the Collector that he had quite recently made an award in similar circumstances and that a particular solicitor has objected to it on the grounds that he has no authority to make such an award in that he did not hold the inquiry.

I shall be grateful to have your views on this matter. I am prepared to advise the present Collector that he can proceed to make the award in this case even though he did not hold the inquiry. I shall be grateful if you will confirm that you are prepared to accept the award made by the present Collector regarding your client's land which the Government intends to acquire."

On the same day the applicants' solicitors wrote the following letter to the State Advocate-General:—

"We refer to our letter of the 18th May and to subsequent telephone conversations between Mr. Sinnathuray and our Mr. Hill. Our clients instruct us that they have no interest in the lands referred to in the proposed *Gazette* Notification enclosed with your letter of the 16th May. We understand from Mr. Sinnathuray that the present Collector is quite prepared to make an award, notwithstanding that he himself did not conduct the inquiry. Our clients confirm that they will raise no objection if this is done. We also understood that there was an outstanding point on which the Collector required further information. Our clients' representative will be available first thing on Monday morning to clear up any outstanding points if you will let us know what these are, and if the Collector will give him an appointment for the purpose.

Our instructions are to insist on an award, and if an award is not made by the date fixed for the hearing of the Motion, we are instructed to proceed with the application for an Order for *Mandamus*. In any event we are instructed to apply for our clients' costs, to which they are undoubtedly entitled."

On the 22nd May, 1961, the applicants' solicitors replied to the State Advocate-General's letter of the 20th May as follows:—

"We thank you for your letter of the 20th May which crossed with ours of the same date. Since then the writer has spoken to Mr. Sinnathuray and we are making arrangements for Mr. Hubball, our clients' representative, to meet the Collector at the latter's office at 2.30 p.m. this afternoon. In the light of their discussions perhaps the writer and Mr. Sinnathuray could have a further discussion on Tuesday after the writer has finished in Court on Tuesday morning with a view to settling, if possible, the future conduct of these proceedings."

Later that same day the applicants' solicitors wrote a further letter to the State Advocate-General in these terms:—

"We refer to our letter of the 22nd May. As arranged, two representatives of our clients' met the Collector at the latter's office at 2.30 p.m. this afternoon. We are instructed that the Collector informed our clients' representatives that he would be unable to make any award by the 26th May. On our clients' representatives enquiring whether he, the Collector, could give any firm date by which an award could be made, the Collector again indicated that he could not give any firm estimate.

A number of other matters were discussed, the full details of which it is unnecessary to set out in this letter. We are, however, instructed that in view of the two points referred to above we are to proceed with the application for an Order of *Mandamus* on Friday, the 26th May."

In his affidavit the present Collector said that "the then Collector of Land Revenue held an inquiry on the 7th and 8th days of November, 1957 and with a view to clarifying certain matters was in correspondence with the applicants until April 1958. He did not however then make an award because the then Government froze the budget in order to give an opportunity to the incoming Government to decide on its development projects" and that "it was finally decided on the 8th of May, 1961 that Government would withdraw the acquisition of certain lands.....and that it would proceed with the acquisition of the remaining land which was declared to be acquired." The Collector further said that "from a perusal of the Notes of Enquiry held by the former Collector of Land Revenue I find that I must cause a further enquiry to be held in relation to one aspect of the compensation, namely, the amount of compensation claimed by the applicants submitted under section 26(c) of the Land Acquisition Ordinance, before I can make an award," and that he asked the applicants on the 22nd May, 1961, to supply him with data substantiating their claim for compensation and the applicants informed him that they did not possess such data and suggested that he obtain them from the technical officers in the public service. The Collector said that to obtain that information from surveyors and engineers in the public service would take some months as the area to be surveyed and investigated is over a hundred acres. The Collector said:—"When I am provided with the above-mentioned information, which I verily believe will take at least three months, I shall be able to make an award regarding the applicants land."

Those are the facts.

Now, this application is resisted on several grounds.

It is submitted that *mandamus* will not lie against the Collector as he is a Crown servant.

Crown Counsel who appears for the Collector argues that the Collector is the agent of the Crown and that therefore *mandamus* will not lie. On the authorities that have been cited to me it appears that that proposition is too large. That proposition is true, (i) if there is no statutory duty imposed by Statute upon one who is the servant of the Crown, (*The Queen* v. *The Secretary of State for War* [1]); (ii) if the servant of the Crown is acting under a statutory power which imposes merely a duty to the Crown, (*The Queen* v. *The Lords Commissioners of the Treasury* [2]). However, that proposition is not true if he is acting under a statutory power which imposes upon him a duty to the public. It seems to me that the test whether the writ should issue is to be found in the case of *The Queen* v. *The Commissioners for Special Purposes of the Income Tax*, [3] where Lord Esher M.R. says (at page 317):—

"With regard to the question whether *mandamus* will lie, I am of the opinion that the case falls within the class of cases, where officials having a public duty to perform and having refused to perform it, *mandamus* will lie on the application of a person interested to compel them to do so."

Lord Reading, C.J., in *R.* v. *The Commissioners for Special Purposes of Income Tax*, [4] after reading the above passage, commented in these words (at page 38):—

"To my mind that is a far-reaching and most salutary provision of the common law. It is true that we, sitting here in the King's Court, and issuing orders commanding persons to carry out duties in the name of the Crown, cannot order the Crown to carry out a duty, yet we can order persons who are charged with statutory obligations to carry out those obligations if they fail to do so, provided they come within the terms of the proposition laid down by Lord Esher."

Taking that view, the question then which arises and which I have to determine is whether there is imposed on the Collector any duty of a public nature in which the applicants are interested and whether the duty imposed is one owing to the Crown alone. After studying sections 6 to 10 of the Ordinance it is impossible not to come to the conclusion that the Collector is invested with powers to decide issues between the Crown and subject under section 10. In other words the Collector is vested by Statute with public duties affecting the rights of private persons and he is there under section 10 in a *quasi*-judicial capacity to decide between subject and the Crown.

It is said that this application is in fact for the payment of money by the Crown and consequently *mandamus* will not lie against the Crown but this application is not to enforce payment of money by the Crown but to enforce the making of an award by the Collector which it is the duty of the Collector to make.

It is, thirdly, submitted that *mandamus* will not lie in this case because the applicants have not exhausted all the available remedies in that they could have appealed to the Minister who could order the Collector to proceed with the acquisition or that the applicants could proceed by way of petition of right to the Yang di-Pertuan Negara. Neither of these two so-called remedies is a specific legal remedy and they cannot therefore be a bar to this application.

On behalf of the Collector, it is said that it is purposeless for him to make an award as he would not be in the position to pay on the award because the Government had frozen the budget and therefore that *mandamus* ought not to go. In support of this proposition the case of *Re The Bristol & North Somerset Railway Co.*, [5] was cited. *Mandamus* was refused in that case because the party against whom the *mandamus* was prayed did not, for reason of want of funds, possess the power to obey. Now that is not the case here. There is nothing to prevent the Collector from making his award. If the Collector has no funds then he need not take possession of the said land and he need only pay eight *per cent* interest on the award until it is paid. In any event the budget was frozen as long ago as 1958 and there is no evidence before me that there are at present no funds available.

Fifthly, it is argued that while there has been a demand, the Collector has not refused to make an award.

As a general rule *mandamus* will not be granted unless it is shown by evidence that there was a distinct demand of that which the party seeking the *mandamus* desires to enforce and that that demand was met by a refusal.

It is conceded in this case that there has been a demand.

According to the cases that have been cited, a refusal may be an absolute refusal in terms or there may be conduct amounting to a refusal. Where the respondent has not refused compliance in express terms it is a question of fact whether his conduct evinces a clear determination not to comply.

In *R.* v. *The Brecknock and Abergavenny Canal Company*, [6] Lord Denham C.J. says (at p. 397):—

"We cannot grant a *mandamus* unless there has been a direct refusal; and here, I think, there has not. It is not indeed necessary that the word 'refuse', or any equivalent to it, should be used; but there should be enough to shew that the party withholds compliance, and distinctly determines not to do what is required."

Delay in complying with the demand may well amount to refusal. In *R.* v. *Central Professional Committee for Opticians*, [7] *mandamus* was refused on the ground that the Committee had not been guilty of such delay as to amount to refusal to consider and determine the application made to them.

When I come to consider the question whether there has been a refusal by the Collector in this case I think the relevant date which the Court is concerned is the date when these proceedings commenced, namely the 25th April, 1961, and the Court must look at the position as on that date.

After consideration of the correspondence and the affidavits that are before me, I find that there has been a refusal by the Collector. It seems to me that the Collector had failed to carry out his statutory duties under the Ordinance. His duty was to make an award after the enquiry under section 10 had been held but he failed to do so for three months and then after two reminders from the Company, he wrote a letter in April 1958 asking for confirmation of the Company's claim in writing. When that was given he still failed to make an award and the reason given was that "the then Government froze the budget in order to give an opportunity to the incoming Government to decide on its development projects." That in my view is no excuse. The duty of the Collector was clear, he should have made an award and leave it to the incoming Government to decide whether to proceed with the acquisition or not. It would appear that this matter was forgotten for 3½ years by the Collector and no action was taken until the Company wrote on the 7th February, 1961. The absence of a reply to the letters of the applicants dated the 5th and 14th April, 1961, coupled with the fact that in the letter of the Commissioner of Lands of the 9th February, 1961 (which was signed by Mr. Un, the Collector, for the Commissioner) it was stated that the withdrawal or otherwise of the acquisition was under active consideration and not that the award was under active consideration and coupled with the fact that 3½ years have elapsed since the enquiry under section 10 was held, is in my view a clear indication of refusal. I am satisfied that the Collector has been guilty of such delay as to amount to a refusal to make an award.

Lastly, it is submitted that *mandamus* ought not to issue as the writ might be made inoperative by certain actions which are beyond the control of the Collector. It is pointed out that, if, as a matter of policy, Government withdrew the acquisition under section 53 the Collector will not be able to comply with the order.

It is true that the Court will not issue a *mandamus* if it appears that the issue of that order would be futile, but I cannot see that will be so in the present case. The Collector has a definite duty under section 10 and even if the acquisition is withdrawn the Collector still has a duty towards the applicants under section 53(2) to determine the amount of compensation due for the damage, if any, due to the said land and to pay such compensation.

For these reasons I am of opinion that a *mandamus* can properly issue to the Collector in this case. The grant of an order of *mandamus* is a matter for the discretion of the Court and in this case I have no hesitation in granting it.

Application granted.

Solicitors: *Rodyk & Davidson; State Advocate-General.*

P.Q.R. v. THE COMPTROLLER OF INCOME TAX, SINGAPORE

[C.A. (Tan Ah Tah Ag. C.J., Buttrose & Ambrose JJ.) July 12, 1961]

[Singapore — Civil Appeal No. 3 of 1961]

Income Tax — Additional assessments — Figures appearing in Statement of Capital and Income — Basis for discussion — Not to be accepted as correct — Onus of proof — Discharge by taxpayer — Income Tax Ordinance (Cap. 166), ss.79, 81, 76(2), 80.

This was an appeal under section 81 of the Income Tax Ordinance from a judgment of Chua J. concerning two additional assessments made on the appellant by the Comptroller for the years of assessment, 1951 and 1952 based on the incomes for the years, 1950 and 1951. The main ground of appeal was that the Board of Review and Chua J. erred in law in regarding the figures appearing in the top line of the Statement of Capital and Income (Exhibit "A").

Held: there was no error of law on the part of the Board of Review, or the learned Judge who regarded the figures on the top line of the said exhibit merely as a basis for discussion and argument between the parties.

Per **Buttrose J.:** "This was an appeal by the taxpayer against these additional assessments and the onus of proving they were excessive lay on the taxpayer. If he did not consider it necessary himself to give evidence in discharge of that onus that was entirely a matter for him."

COURT OF APPEAL.

David Marshall for the appellant.

Lim Chor Pee (Crown Counsel) for the respondent.

Cur. Adv. Vult.

Tan Ah Tah Ag. C.J.: This is an appeal from a judgment of Chua J. whereby he upheld the decision of the Board of Review in an appeal which was lodged by the appellant under section 79 of the Income Tax Ordinance (Cap. 166) and heard by the Board of Review under section 80 of the Ordinance.

At the hearing before the Board of Review a document which was described as a Statement of Capital and Income was put in and marked as Exhibit A. It has been strenuously argued by counsel for the appellant in this Court that both the Board of Review and the learned Judge committed the error of regarding the figures appearing in the top line of Exhibit A. which were intended to be used as a basis for discussion, as figures which were agreed and accepted as being correct. A perusal of the grounds of judgment of the Board of Review and of the learned Judge shows that there is no substance in this ground of appeal.

The view the Board of Review took of Exhibit A can be seen from the following passage from their grounds of judgment:—

"The appellant sought to prove that the items shown in the agents' figures in Exhibit A should be deducted. The Board did not accept the evidence of Mr. A.B.C. and the books of account produced and in the absence of the evidence of the appellant found that the onus of proof placed upon him by the Ordinance had not been discharged."

In his judgment the learned Judge, after referring to Exhibit A, expresses himself as follows:—